

STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

OFFICE OF THE DIRECTOR

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Arnold Schwarzenegger, Governor



October 19, 2005

Mr. Steve Hackett
P.O. Box 505
Ferndale, CA 85536

Re: Public Works Case No. 2004-050
Howe Creek Ranch Habitat Restoration Project
California Department of Fish and Game

Dear Mr. Hackett:

This constitutes the determination of the Director of Industrial Relations regarding coverage of the above-referenced project under California's prevailing wage laws and is made pursuant to Title 8, California Code of Regulations, section 16001(a). Based on my review of the facts of this case and an analysis of the applicable law, it is my determination that the proposed habitat restoration project ("Project") is a public work subject to the payment of prevailing wages.

Factual Summary

Hackett Timber and Livestock ("HT&L") is a private business that owns and operates the Howe Creek Ranch in Humboldt County. The Department of Fish and Game ("DFG") and HT&L have prepared a draft Agreement described therein as "one of several contracts to be implemented ... as part of a comprehensive, lower Eel River watershed restoration effort." Draft Agreement, Exhibit A - Scope of Work, p. 1. By entering into this contract with DFG, HT&L agrees to undertake certain improvements designed to reduce upslope erosion alongside a stream on the Ranch and to restore the salmon and trout habitat in the stream.

The proposed scope of work for the Project includes planting trees; placing and securing boulders, logs and weirs in the stream; building electric fences to keep livestock away from the stream and stream banks; installing water troughs (including concrete pads) and storage tanks for the livestock who will now be unable to reach the stream; and resurfacing livestock trails with rock.

Total Project costs will amount to \$350,715. These costs will be paid for with \$151,901 from DFG's Fisheries Restoration Grant Program, \$176,315 in federal funds and a \$22,499 share of cost contribution by HT&L. Draft Agreement, Exhibit B - Budget Detail

and Payment Provisions, p. 4. Under the draft Agreement, DFG is to make payments to HT&L up to the awarded grant amount on a monthly basis upon submission by HT&L of an invoice detailing charges, expenses, and direct and indirect costs.

Analysis

"Public works" are defined by Labor Code section 1720(a)(1).¹ In pertinent part, that statute provides, "'public works' means: ... Construction, alteration, demolition, installation or repair work done under contract and paid for in whole or in part out of public funds" Thus, under section 1720(a)(1), there are three basic elements to the definition of a public work. First, a project must be construction, alteration, demolition, installation or repair work. Second, the work must be done under contract. And, third, it must be paid for using public funds.

As to the type of work element of a public work, all of the work described above is "construction, alteration, demolition, installation or repair work." The fence work,² which requires erecting electrified fences to exclude livestock from certain areas, involves construction and installation.³ The water system work, which requires the installation of water troughs and the construction of concrete pads for water storage tanks, involves construction and installation. The resurfacing of livestock trails involves construction.⁴

The work of placing boulders, logs and weirs in and around the stream is also construction. The boulders will be between one-fourth of a ton and five tons, and will be placed in the stream with a bucket loader. Dirt must be dug out in order to place the boulders, and the boulders are wired into place. Some logs or

¹ All statutory references herein are to the Labor Code, unless otherwise stated.

² Under the Draft Agreement, HT&L is also required to maintain the fencing. Under section 1771, maintenance work requires the payment of prevailing wages. Maintenance is defined in California Code of Regulations, title 8, section 16000 as work done for the "preservation, protection and keeping of any publicly owned or publicly operated facility." The fencing is not a publicly owned or operated facility and therefore the maintenance work involved here does not require the payment of prevailing wages.

³ See, e.g., PW 99-102, *Cal Trans, San Diego Border Patrol and California Highway Patrol Facility/Installation of Fencing, National Fence* (September 23, 1999).

⁴ See, e.g., PW 2001-054, *Tauhindauli Park and Trail Project/City of Dunsmuir* (March 28, 2002) [scope of work including construction of trails, excavation of a floodplain, rerouting of a creek and installation of fences done under contract and paid for with grant funds is a public work].

boulder piles will also be placed in the stream to divert water flow or to create weirs. According to detailed drawings accompanying the grant proposal, the design and placement of the boulders and logs is carefully planned and engineered. This work involves the building of a structure and constitutes construction work.

The work of planting trees is alteration, within the meaning of section 1720(a)(1). "To 'alter' is merely to modify without changing into something else," and that term applies "to a changed condition of the surface or the below-surface." *Priest v. Housing Authority* (1969) 275 Cal.App.2d 751, 756. "Alter" as defined by Webster's Third New International Dictionary (2002) at page 63 is "to cause to become different in some particular characteristic (as measure, dimension, course, arrangement or inclination) without changing into something else." Thus, with regard to land, under these definitions, to alter under section 1720(a)(1) is to modify a particular characteristic of the land.

The planting of trees will modify the land, creating an area of trees where previously there was none. A particular characteristic - the presence of trees - will be added so that the land no longer erodes as before. Therefore, the tree planting under these facts constitutes alteration under section 1720(a)(1).

As to the contract element of a public work, the proposed work will be performed under contract between HT&L and DFG. HT&L argues that the draft Agreement is not a contract; however, the draft Agreement clearly is a contract in that it provides that HT&L will perform certain work in exchange for valuable consideration. HT&L also argues that the Draft Agreement is not a construction contract. Section 1720(a)(1) does not require that the contract be a construction contract.

As to the public funding element of a public work, the Project will largely be paid for with State and Federal funds, which are public funds. HT&L argues that California prevailing wage law is not applicable to a private landowner project, such as the Project here, which is publicly subsidized with grant money. The definition of "public funds" includes state, local and/or federal monies. Tit. 8, Cal. Code Regs., § 16000. The grant funds here fall within the definition of public funds. See, e.g., PW 2001-053, *Lobero Theatre Renovation* (May 13, 2002); PW 2001-054, *Tauhindauli Park and Trail Project/City of Dunsmuir* (March 28, 2002). In both of these precedential public works coverage decisions, projects funded with grant money derived from the public coffers were found to be public works.

Therefore, under the facts of this case, consistent with the prior precedential public works coverage determination referenced in footnote 4, the Project meets the elements of a public work set forth in section 1720(a)(1).

No statutory exception to California prevailing wage law applies here. Fish and Game Code section 1501.5 allows a narrow exception to California prevailing wage law for projects involving habitat restoration in which there is a contract between DFG and a public agency, nonprofit or Indian tribe. Much of the work at issue in this case involves habitat restoration and might therefore be excluded from coverage by California prevailing wage law if the subject contract were between DFG and a public agency, nonprofit organization or Indian tribe. However, this exception does not apply because the contract here is between DFG and a private entity, HT&L. Labor Code section 1720.4 provides a limited exception to coverage under California prevailing wage law for work performed by volunteer labor. This exception is not applicable because the work here is not being performed by volunteers or volunteer coordinators, as those terms are defined in that section, nor by the California or Community Conservation Corps.⁵

HT&L contends that California prevailing wage law was not intended to apply to non-competitively bid projects undertaken on private land in which the State has no proprietary interest and the public no access or right of use. Section 1720(a)(1) does not distinguish work performed on private from work performed on public land. PW 2000-036, *Carlson Property Site Lead Affected Soil Removal & Disposal Project* (May 31, 2000). It only requires a finding that construction, alteration, demolition, installation or repair work is being performed under contract and is being paid for with public funds. Further, a project can still be a public work even if it is not competitively bid. "While competitive bidding is required by many instances by the Public Contract Code, nothing in the Labor Code indicates that competitive bidding is a predicate to a determination that a project is a public works project." PW 91-056, *Southern California Regional Rail Authority Lease of Union Pacific Right-of-Way* (November 30, 1993).

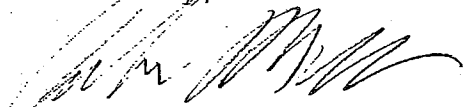
⁵ While public works coverage determinations are made on a statutory, not contractual, basis, we note that the draft agreement explicitly states that prevailing wages may be required, with the two potential exceptions contained in Fish and Game Code section 1501.5 and Labor Code section 1720.4, as discussed above. Draft Agreement, Exhibit A - Scope of Work, p. 3. See *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976.

Letter to Steve Hackett
Re: Public Works Case No. 2004-050
Page 5

In conclusion, the Project is construction, alteration and installation done under contract and paid for in part with public funds. Accordingly, it is a public work with no applicable exception, and prevailing wages must be paid.

I hope this determination letter satisfactorily answers your inquiry.

Sincerely,

A handwritten signature in dark ink, appearing to read "John M. Rea", is written over a horizontal line.

John M. Rea
Acting Director